No. 1231

In the Supreme Court of the United States

OCTOBER TERM, 1945

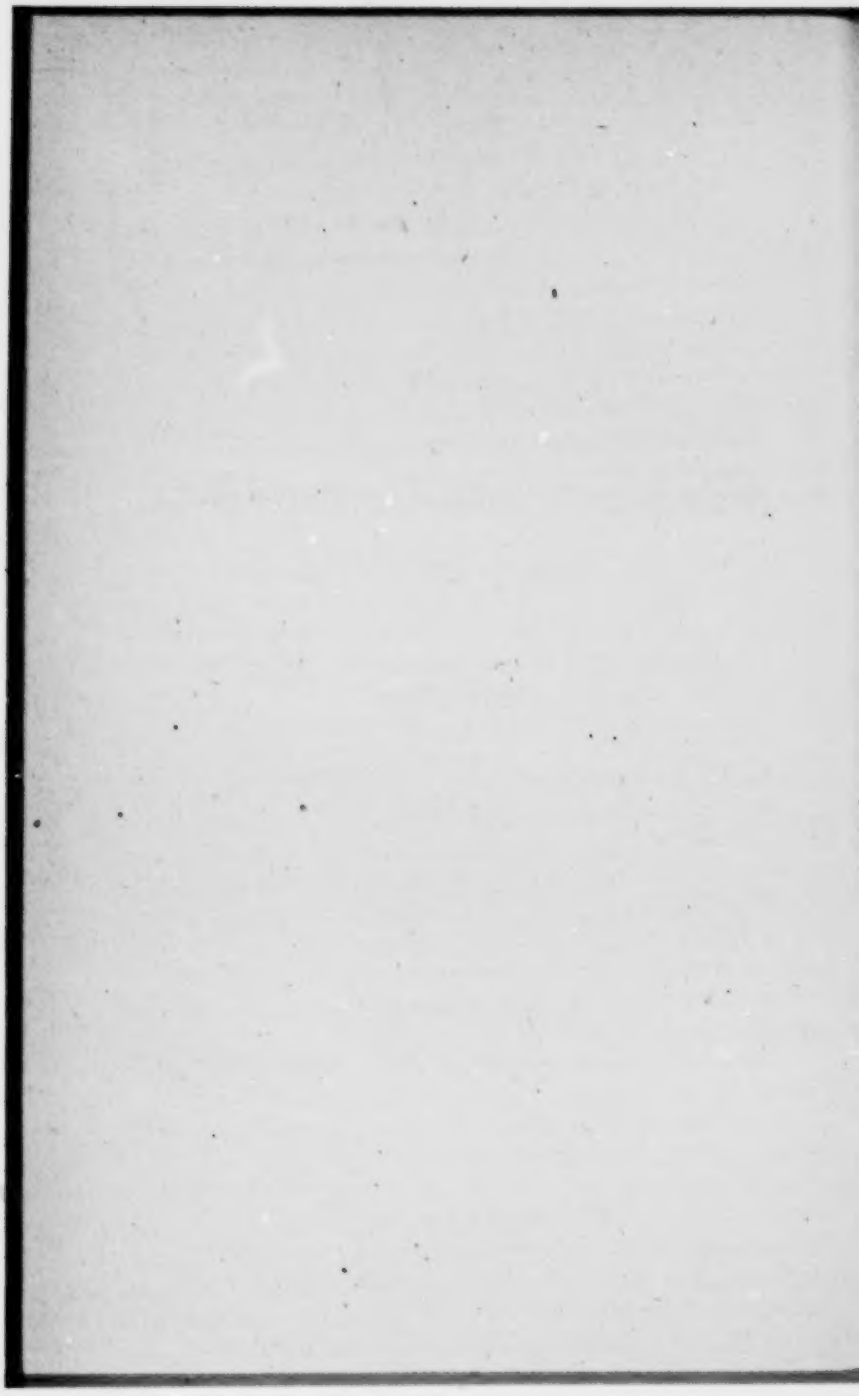
FOREST E. LEVERS, ADMINISTRATOR, ETC.,
PETITIONER

v.

A. V. ANDERSON, DISTRICT SUPERVISOR, ALCOHOL TAX UNIT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION



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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 458–463) is reported in 153 F. 2d 1008.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 12, 1946 (R. 463). A petition for rehearing (R. 464–465) was denied on March 27, 1946 (R. 465). The petition for writ of certiorari was filed in this Court on May 15, 1946. The jurisdiction of this Court is invoked

under Section 4 (h) of the Federal Alcohol Administration Act (c. 814, 49 Stat. 977) and Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there is presented the question whether the evidence shows a substantial restraint or prevention of transactions in interstate commerce within the meaning of Sections 5 (a) and 5 (b) of the Federal Alcohol Administration Act?

2. Whether consistent with the Twenty-First Amendment, the Federal Government may refuse to grant a permit to engage in interstate commerce in intoxicating liquors to a person who is engaged in intrastate transactions with respect to such liquors which restrain interstate commerce, when such intrastate activities are unlawful under the laws of the state in which they take place.

3. Whether the annulment of a basic permit held by an administrator of an estate and the refusal to issue new permits to him, is a denial of due process of law when the annulled permit was procured by fraud and the operations proposed by the requested new permits are likely not to be maintained in conformity with Federal law.

STATUTE AND REGULATIONS INVOLVED

The Twenty-First Amendment, the pertinent provisions of the Federal Alcohol Administration

Act, 49 Stat. 977, 27 U. S. C. 201, and of the laws of the State of New Mexico relating to intoxicating liquors are printed in the Appendix, *infra*, pp. ——.

STATEMENT

Pursuant to the provisions of Section 4 (a) of the Federal Alcohol Administration Act, Forest E. Levers and Ray E. Levers, d/b/a Levers Brothers, applied for and, on March 21, 1936, were issued a wholesaler's basic permit (R. 153). On October 1, 1941, Ray E. Levers died (R. 154). On October 6, 1941, the Probate Court of Chaves County, New Mexico, appointed Forest E. Levers "Special Administrator of the Estate of Ray E. Levers * * * insofar as the partnership assets in the firm of Levers Brothers is concerned" (R. 160). On October 10, 1941, Oran C. Dale, the only son-in-law of Ray Levers, was "appointed co-administrator with F. E. Levers to administer the partnership assets" of Ray Levers (R. 168). Thereafter in accordance with the requirements of Section 4 (g) of the Act, Forest E. Levers and Dale applied for and, on December 26, 1941, were issued a new wholesaler's basic permit (R. 170).

On November 5, 1943, respondent, District Supervisor, acting pursuant to Section 4 (e) of the Act, issued an order to show cause why this basic permit should not be annulled (R. 146).

On November 15, 1943, Dale was discharged by the Probate Court as co-administrator (R. 179),

thereby making it necessary, under Section 4 (g) of the Act, for Forest E. Levers to apply for a new permit. On November 29, 1943, Forest E. Levers, as co-partner and Special Administrator, applied for a new wholesaler's basic permit and for an importer's basic permit (R. 171, 181). On December 18, 1943, pursuant to Section 4 (b), respondent issued a notice of contemplated denial of each of these two applications (R. 180, 191, 198).

The order to show cause why the wholesaler's basic permit issued to Forest Levers and Oran Dale in December 1941 should not be annulled charged that petitioner Levers and Oran Dale procured it by concealing and misrepresenting material facts [1] relating to the ownership or control of another corporation and to the ownership or control in violation of Sections 5 (a) and 5 (b) of the Act, of outlets selling alcoholic beverages at retail (R. 146–148). The notices of contemplated denial of Forest Levers' applications for a wholesaler's and importer's basic permit charged that evidence in the possession of the Alcohol Tax Unit concerning the way in which certain phases of the business had been carried on was persuasive that the business proposed to be carried on would not be maintained in conformity with Federal law (R. 180–181, 191, 193).

[1] Petitioner erroneously implies that the concealments and misrepresentations were by predecessors of petitioner and made in procuring a permit in 1936 (Br. pp. 3, 15).

In a letter to petitioner giving more fully the reason for the contemplated denial of the applications (R. 193–194), respondent stated he was of the view that practices exist that would be continued in violation of Sections 5 (a) and (b) of the Act; that these practices result in control of certain retail outlets for alcoholic beverages in the State of New Mexico, that such control "affects the purchasing policy of these outlets" as to liquors moving in interstate commerce and that "Levers Brothers would continue to control the path" of such liquor to their own advantage and the disadvantage of others (R. 198–199).

Petitioner requested a hearing on the order to show cause and on each of the two notices of contemplated denial (R. 193–194). The hearings in the three proceedings were consolidated (R. 4–6). Although petitioner took part in the hearing, he introduced no evidence in his behalf. The Hearing Officer rendered a consolidated report (R. 377–421) in which he found: (1) Levers Brothers openly owned and controlled retail liquor stores prior to the passage of the Federal Alcohol Administration Act (R. 393–394); (2) Levers Brothers has concealed and continued this ownership and control ever since the passage of the Act (R. 419–420); (3) Levers Brothers has controlled the buying power of these stores and of others financially obligated to it and has insisted that practically all of their purchases be made from Levers Brothers (R. 419–420);

(4) Forest Levers and Oran Dale knowingly concealed this material fact in their application for the Wholesaler's Basic Permit issued to them in 1941 and thereby procured its issuance (R. 419, 420–421); (5) Forest Levers knowingly concealed this fact in his 1943 application for a wholesaler's and for an importer's basic permit. The petition does not urge that these findings are unsupported by the evidence.

The respondent approved these findings (R. 422) and further found that the Wholesaler's Permit issued in 1941 had been procured by concealment of material fact and was subject to annulment under Section 4 (e) (3) of the Act (R. 421–422), and that the operations proposed under the wholesaler's and importer's basic permits applied for in 1943 were not likely to be maintained in conformity with Federal law for the reasons set forth in the notices of contemplated denial (R. 424, 426).

Without availing himself of available procedures for administrative relief, petitioner filed his petition for review in the Circuit Court of Appeals (R. 1–3), which, without considering the merits, dismissed the petition for failure to exhaust administrative remedies (R. 457, 459). This Court reversed the judgment of the Court of Appeals and remanded the case for hearing on the merits (R. 456–458). Upon hearing on the merits, the court below affirmed the orders of the District Supervisor (R. 458–463).

ARGUMENT

Of the questions now claimed to be presented, only one—the question relating to interstate commerce—was presented to the District Supervisor or to the Circuit Court of Appeals.[2] Section 4 (h) of the Act[3] and the practice in this Court limiting review to questions passed upon by the court below both operate to confine review in this case to that question.[4] We shall nevertheless also briefly note the lack of substance in the other questions claimed to be presented.

I

The question whether the evidence shows that Levers Brothers' control of various retail outlets

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[2] See R. 2. The petition for review filed in the Circuit Court of Appeals challenges respondent's "power and jurisdiction to annul petitioner's permit or to refuse to issue a permit to him" (R. 2), but the consistent basis of this challenge has been that such power would be an unconstitutional invasion of the right of a state to regulate the administration of estates. (Brief submitted to Hearing Officer; Brief in Circuit Court of Appeals.) This contention is adequately disposed of in the opinion of the court below (R. 461).

[3] "No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do."

[4] Petitioner, in challenging the construction of the regulations relating to administrative review adopted by the Circuit Court of Appeals, argued that resort to such procedures should not be required when, like petitioner, a person was not raising any objection to the order not already presented to the respondent (Pet. Br. p. 17).

substantially restrains or prevents interstate commerce need not be determined in this case. The issue in the annulment proceedings was whether petitioner procured the wholesaler's basic permit in 1941 by concealing or misrepresenting a material fact. The evidence showed, and respondent made the now unchallenged finding, that petitioner knowingly falsely denied that Levers Brothers controlled various retail outlets and their buying policies (R. 420–421). Withholding this information deprived respondent of knowledge which would have enabled him, either with or without further investigation, to perform his statutory duty of determining whether the proposed business would likely be maintained in conformity with Federal law. This is the test of materiality. It is not whether the facts now shown to have been concealed establish petitioner's ineligibility for the permit. Furthermore, one who procures or applies for a permit on the basis of false statements can not complain if the permit is annulled or denied upon discovery of the fraud. This has been held to be so even irrespective of whether the underlying statute is constitutional. *United States* v. *Kapp*, 302 U. S. 214; *Kay* v. *United States*, 303 U. S. 1; *Capitol Wine & Spirits Co.* v. *Berkshire*, 150 F. 2d 619, certiorari denied 66 S. Ct. 896. The fraud in petitioner's applications thus makes it immaterial whether petitioner's conduct affected interstate commerce.

The issue in each of the application proceedings was not, as petitioner assumes, whether the operations now conducted by petitioner were in violation of Sections 5 (a) or 5 (b). The issue was whether petitioner was likely to maintain operations in conformity with Federal law. On this issue the evidence showed and the respondent made the unchallenged finding of long continued hidden ownership or control of retail outlets (which was in violation of state law (*infra*, p. —) and of Federal law when interestate commerce is affected), deliberately concealed in all the various Federal permit applications from 1935 through 1943 (R. 420–421). The evidence further showed that the number of controlled retail outlets was not static (R. 368, 103–104, 88, 93); that the seven outlets controlled in 1943 purchased almost 15,560 wine gallons of distilled spirits from June 1 through October 1943 (R. 368–372); and that the controlled outlets in normal times could have sold more distilled spirits and beer if they had been free to purchase brands handled by others than Levers Brothers (R. 72, 97–8).

If the interstate commerce contention is to be considered, the limited question presented is whether there can be a violation of Sections 5 (a) or 5 (b) when the exclusive or tied outlets are located in the same state as the wholesaler to which they are tied and all other wholesalers from which the outlets could legally purchase intoxicating beverages. All the liquor, of course, was purchased by the wholesalers outside the state, and the ownership of outlets obviously diverts the interstate flow to the law violator and

away from his competitors. See R. 463. It is settled that restraints upon intrastate sales may restrain interstate commerce. *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293.

II

The contention that the holding of the court below subordinates the liquor laws of the State of New Mexico to those of the Federal Government and is therefore in conflict with the policy expressed by this Court in *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, is without merit. The holding below does not prevent petitioner from engaging in the wholesale liquor business within New Mexico. The implication that the refusal to grant permits under the Federal law to purchase intoxicating liquors in interstate commerce is, as a practical matter, in view of the absence of producers of such liquors in New Mexico, a nullification of the authority granted by the state, is obviously immaterial.[5]

The grant of permission by New Mexico to engage in the wholesale liquor business cannot carry with it a grant of permission to engage in interstate commerce in defiance of a Federal law. The Twenty-first Amendment does no more than remove the barrier of the commerce clause to state legislation which, in furtherance of local

[5] It may be noted that the laws of New Mexico specifically authorize one New Mexico wholesaler to buy from another New Mexico wholesaler. New Mexico Statutes, Sec. 61–504.

policy, blocks interstate highways to intoxicating liquors. *United States* v. *Frankfort Distilleries, Inc., supra.* The Federal Government may enact legislation conditioning the right to engage in interstate commerce in such liquors when the legislation does not nullify or conflict with state law. The Federal Alcohol Administration Act has conditioned the right to engage in interstate commerce on compliance with Sections 5 (a) and (b) of the Act which prohibit exclusive outlets and "tied houses" under circumstances which restrain interstate commerce.

In any event, New Mexico itself prohibits exclusive outlets and "tied houses" under these and other circumstances. New Mexico Statutes, 1941, Sec. 61–908.[6] The effect of the holding below therefore is not to subordinate but to implement state policy.

[6] The substantial identity of language between Sections 5 (a) and 5 (b) of the Act and Section 61–908 of the New Mexico Statutes, 1941, clearly indicates that the New Mexico prohibitions against exclusive outlets and "tied houses" were copied from Sections 5 (a) and (b) of the Act.

III

The contention that the revocation of a permit procured by fraud and the denial of other permits for operations which, it has been found, will probably not be conducted in accordance with Federal law, is so severe as to constitute an abuse

of discretion and a denial of due process requires no discussion.[7] Neither does the suggestion that the proper course for the respondent to have pursued was to disregard the remedies specified, and the duties imposed upon him, by Congress and "bring this matter to the attention of the [Probate] court and had petitioner removed as an administrator" (Pet. p. 21).

CONCLUSION

The decision presents no questions meriting review by this Court and is clearly correct. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

MAY 1946.

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[7] Insofar as the plea for clemency is based upon petitioner's claimed freedom from a criminal record (Pet. 7, 20), we wish to point out that there is nothing in the record which supports this statement. The Transcript of Record filed in the Circuit Court of Appeals for the Tenth Circuit in another case instituted by Forest E. Levers to review a subsequent order of Stewart Berkshire denying an application for a wholesaler's basic permit, shows that Forest E. Levers was fined $100 for contempt of the District Court of Chaves County, New Mexico, for attempting to obstruct justice by preventing a minor from testifying as a witness in a criminal case charging one of the retail outlets controlled by Levers Brothers with selling intoxicating liquor to such minor. *Levers* v. *Anderson*, No. 3321 C. C. A. 10, Tr. pp. 235–240.